A

PERAK INTEGRATED NETWORK SERVICES SDN BHD v. HJ AHMAD KAMAL ZAKARIA & ORS

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
SEE MEE CHUN JCA
B MOHAMED ZAINI MAZLAN JCA
[CIVIL APPEAL NO: B-02(NCVC)(W)-2274-12-2021]
29 AUGUST 2024

C **Abstract** – *(i) A collateral purpose requires that the purpose of initiating the process must be for some purpose other than to obtain genuine redress which the process offers. It is aimed at producing a result not intended by the invocation of the suit; (ii) Legal fees and expenses are costs and cannot be recoverable as damages in proceedings between the same parties. Legal fees are not claimable as special damages.*

D

TORT: *Abuse of process – Claim for – Whether suit maliciously and without reasonable and probable cause instituted – Whether there was insufficient pleadings – Whether there was lack of collateral purpose – Whether adverse inference could be drawn – Whether submission of no case to answer could be accepted – Whether there was tort of abuse of court process*

E

DAMAGES: *Proceedings – Legal fees and expenses – Whether could be recoverable as damages in proceedings between same parties – Whether legal fees claimable as special damages*

F The respondents filed a claim against the appellant, Perak Integrated Network Services Sdn Bhd ('PINS'), for the tort of abuse of court process at the High Court. The first respondent was the Chief Executive Officer of the third respondent ('Bunga Raya') and director of the fourth respondent ('Urban Domain') while the second respondent was the director of Urban G Domain. PINS, Bunga Raya and Urban Domain were parties to a joint venture to carry out concession works and licence works *via* a special purpose vehicle ('PINS OSC'). This joint venture was created through various agreements including a joint venture agreement ('JVA'). Urban Domain filed Suit 1041 on behalf and for the benefit of PINS OSC alleging H breaches of contract against PINS, which was allowed. Suit 154 was filed by PINS against the respondents for breaches of the JVA and of fiduciary duties, which was dismissed. In the statement of claim of this suit, reference was made to Suit 154 which the respondents said was maliciously and without reasonable and probable cause instituted by PINS for which reliance would be placed on the amended writ and statement of claim for their full terms and I effect. The respondents stated that Suit 154 was dismissed based on, *inter alia*,

that it constituted an abuse of process. The respondents also relied on an admission by one Zadey Che Wan Abdullah ('Zadey') where it was said to constitute an abandonment of the pleaded claim in Suit 154. The Judicial Commissioner ('JC') held that the respondents, on their pleaded case and through their testimonies, successfully discharged their burden of proof and had proven their case on a balance of probabilities. On damages, the JC held that the respondents were entitled to damages and compensatory damages such as legal fees and expenses incurred to defend the suit as well as exemplary, punitive and aggravated damages. The respondents were awarded RM1,295,056 as legal fees and expenses in defending Suit 154 as proven through supporting documents. As general damages, RM100,000 was each awarded to the first respondent, Bunga Raya and Urban Domain and RM60,000 to the second respondent. This appeal by PINS was mounted on several fronts namely, insufficient pleadings, the lack of a collateral purpose and the High Court's treatment of its no case to answer.

Held (allowing appeal in part)
Per See Mee Chun JCA delivering the judgment of the court:

(1) The respondents' claim was essentially that Suit 154 was filed to neutralise the effect of Suit 1041. It was contended by PINS that the effect of the judgment in Suit 1041 could only be neutralised or avoided if it had won Suit 154, which it did not. Therefore, it would be impossible for the outcome of Suit 1041 to be neutralised just because PINS filed Suit 154. In other words, it was necessary for PINS to achieve victory in Suit 154 or win Suit 154. The collateral purpose of the neutralisation of the judgment obtained in Suit 1041 could never be achieved by merely filing Suit 154. PINS was only interested to obtain a favourable outcome in Suit 154. The filing of Suit 154 in itself could not give rise to a collateral purpose. Whether or not PINS wins or secures victory in Suit 154 was not a necessary element in the tort of abuse of process. A collateral purpose requires that a purpose of initiating the process must be for some purpose other than to obtain genuine redress which the process offers. It is aimed at producing a result not intended by the invocation of the suit. It was not required that PINS must win the process in Suit 154. (paras 32-40)

(2) The JC had, in the summary of the first respondent's evidence, stated the basis of PINS' action was based on his own knowledge of revenge and understanding of injustice, that it was a retaliation for the filing of Suit 1041 and a bargaining chip for Suit 1041. All these showed the collateral purpose in the initiation of Suit 154. The fact remained that PINS had to put questions to the first respondent with regard to the discussion, where he said he would not agree to accept Suit 154 as a bargaining chip, that it only took place during mediation. The answer

of the first respondent was there were other discussions and not just at mediation. Further, as held in *Superintendent Of Lands And Surveys, 4th Division & Anor v. Hamit B Matusin & Ors,* 'evidence bearing on the two alleged defences is not such a radical departure but a mere development of what had been alleged by the defendants.' In addition, PINS was not taken by surprise at those words where there was no rebuttal submission from it. Ultimately, the JC had correctly found that the tort of abuse of court process had been proved by the respondents. There was no reason to depart from this finding. (paras 50-53)

(3) The abandonment of PINS' pleaded case and the admission that the individual respondents were sued because they were related to Bunga Raya showed that PINS was not contemplating victory and not seeking genuine redress in initiating Suit 154. This effectively meant that PINS' own evidence showed its collateral purpose in filing the suit. This, coupled with the evidence of the respondents' witnesses, fortified the collateral purpose behind Suit 154. (para 60)

(4) In the face of silence from PINS, the evidence given by the respondents ought to be presumed as true. Adverse inference could also be drawn. PINS could take the position that accepting the respondents' evidence on the face of it, there was no case to answer; or that the evidence led was unsatisfactory that the court should find that the burden of proof had not been discharged. However, PINS' position was that the respondent's evidence was not pleaded, which was rejected. PINS' position did not fall within the above two circumstances of no case to answer as laid out above. The submission of no case to answer could not be accepted and the inelegant silence of PINS in this suit, due to their 'less than stellar evidence' in Suit 154, to be a matter of immense serious consequences that it had to live with, as per *Takako Sakao v. Ng Pek Yuen & Anor.* It lent further support to the respondents' case. The respondents have proved their claim premised on the tort of abuse of court process. (paras 64-70)

(5) The case *Golden Star & Ors v. Ling Peek Hoe & Anor And Another Appeal ('Golden Star')* made it clear that legal fees and expenses were costs and could not be recoverable as damages in proceedings between the same parties. Arising therefrom, costs are not recoverable as damages where the respondents could not commence this suit to recover its costs incurred in Suit 154 as special damages. It was not disputed too that costs had been awarded at all levels of the courts in Suit 154. Therefore, this court was bound by the Federal Court decision in *Golden Star* that legal fees are not claimable as special damages. Thus, the special damages of RM1,295,056 to Bunga Raya being the legal fees and expenses incurred, was set aside. The decision on liability and the award of general damages were affirmed. (paras 75-80)

Case(s) referred to:

Crawford Adjusters & Others v. Sagicor General Insurance (Cayman) Ltd & Another [2013] 3 All ER 8 ***(refd)***

Golden Star & Ors v. Ling Peek Hoe & Anor And Another Appeal [2024] 6 CLJ 487 FC ***(foll)***

Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA ***(refd)***

Superintendent Of Lands And Surveys, 4th Division & Anor v. Hamit B Matusin & Ors [1994] 3 CLJ 567 SC ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 18 r. 19

For the appellant - Razlan Hadri Zulkifli & Lee Guo Wen; M/s Gan Ho & Razlan Hadri
For the respondents - Leong Kwong Wah, Vincent Lim Seng Liang & Sera Foong Chui-Yeng; M/s Dennis Nik & Wong

[Editor's note: For the High Court judgment, please see Ahmad Kamal Zakaria & Ors v. Perak Integrated Network Services Sdn Bhd [2022] CLJU 3120; [2022] 1 LNS 3120 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

See Mee Chun JCA:

Introduction

[1] This appeal centres around the not-too-common tort of abuse of court process, as distinct from the power of the court to strike out a case for abuse of process under O. 18 r. 19 of the Rules of Court 2012.

[2] The plaintiffs/respondents had filed a claim against the defendant/appellant (Perak Integrated Network Services Sdn Bhd (PINS)) for the tort of abuse of court process, which was allowed by the High Court, giving rise to this appeal.

Parties

[3] PINS is a company involved in the telecommunications industry. The first respondent is the Chief Executive Officer of the third respondent (Bunga Raya) and director of the fourth respondent (Urban Domain). The second respondent is the director of Urban Domain and its financial manager in charge of bookkeeping and accounting.

Background Facts

[4] PINS, Bunga Raya and Urban Domain were parties to a joint venture to carry out concession works and licence works *via* a special purpose vehicle (PINS OSC). This joint venture was created through various agreements, including a joint venture agreement dated 22 February 2006 between PINS and Bunga Raya (JVA).

Kuala Lumpur High Court Suit No. 22NCC-1041-07/2012 (Suit 1041)

[5] Suit 1041 was a derivative action filed by Urban Domain on behalf of and for the benefit of PINS OSC, alleging breaches of contract against PINS and breach of fiduciary duties against one Dato' Seri Abdullah Fadzil Che Wan. The claim was allowed on 26 September 2013.

Kuala Lumpur High Court Suit No. 22NCVC-154-04/2014 (Suit 154)

[6] Suit 154 was filed by PINS on 2 April 2014 against the respondents for breach of the JVA and breach of fiduciary duties. On 14 July 2017, Suit 154 was dismissed but became the genesis to the respondents' claim for abuse of process against PINS.

Shah Alam High Court Suit No. 23NCVC-42-09/2019 (This Suit)

[7] The statement of claim for this suit is to be found in encl. 41/55-61. In para. 8, reference is made to Suit 154, which the respondents said was maliciously and without reasonable and probable cause instituted by PINS for which reliance will be placed on the amended writ and statement of claim for their full terms and effect. It is to be noted that the claim for malicious prosecution was withdrawn during the proceedings.

[8] In para. 9, the respondents stated that Suit 154 was dismissed based, *inter alia*, that it constituted an abuse of process. It was further stated that they will refer to the High Court order dated 14 July 2017 and the grounds of judgment dated 14 July 2017 for their full terms and effect.

[9] This was next said in para. 10:

> 10. In particular, the plaintiffs will rely on paragraph 52.3 of the Ground of Judgment which reads, "*On that analysis, and based on the narrative of facts alluded to earlier, I am convinced that this suit is plainly and patently an abuse of process*." and paragraph 79 which reads "*As I stated earlier, the filing of this suit in light of all of the events had taken place earlier, is an abuse of process. This suit should clearly have been brought as part of the PINS counterclaim in suit 1041 and D1 to D5 could have been brought in as additional parties to the counterclaim. In that way, all necessary and relevant parties would have been present and everything could have been dealt with by the learned Judge in that case. Of course, suit 1041 would have become a more complex but that is far better than to have two (2) Courts to hear suits which arose out of the same factual matrix involving more or less the same players and the same documents. Clearly, this is a classic case where estoppel and res judicata should apply*."
>
> (emphasis added)

[10] The respondents would also rely on an admission by Zadey Che Wan bin Abdullah Fadzil, where it was said to constitute an abandonment of the pleaded claim in Suit 154 (paras. 12 and 13).

[11] As noted earlier, Suit 154 filed by PINS was dismissed on 14 July 2017, its appeal to the Court of Appeal was dismissed on 4 July 2018 and leave to the Federal Court was dismissed on 14 January 2019.

Decision Of The High Court

[12] The grounds of judgment (GOJ) of the Judicial Commissioner (JC) can be found in encl. 53/23-58.

[13] The JC went through the applicable law on the tort of abuse of process and referred to *Crawford Adjusters & Others v. Sagicor General Insurance (Cayman) Ltd & Another* [2013] 3 All ER 8, and *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340; [1998] 2 MLJ 425.

[14] At para. 47, the JC stated as follows:

> [47] Thus, in order to succeed in this suit, it is incumbent upon the plaintiffs to show all the requisite elements of the tort of abuse of process have been proved. The elements I refer to is as follows:
>
> (i) the process complained of has been initiated;
>
> (ii) there was a collateral purpose proven; and
>
> (iii) damage or injury was suffered by the plaintiffs as a consequence

[15] The first element of initiating the process complained of was satisfied when Suit 154 was completed and decided in favour of the respondents (para. 48).

[16] The second element of oblique motive/collateral purpose was next considered. The JC found as follows:

> (54) The learned judge had pondered the question as to why the claim and the multitude of allegations against all the plaintiffs was not raised in the earlier suit. In paragraph 49 of the GOJ the learned judge raised this question:
>
> **… why PINS did not make the present claim as part of its counterclaim in Suit No 1041?**
>
> (58) In my considered view the trenchant findings of the learned judge in Suit No 154 left no room for any lingering doubt that His Lordship was convinced that Suit No 154 was filed for a collateral purpose, an oblique motive and not merely on the issues of estoppel and *res judicata*. The court can only make findings from the records, the evidence before it and from the GOJ of the learned judge. I have scrutinized and considered the GOJ carefully and it is my conclusion that the learned judge had spent a good part of his judgment on establishing that PINS had committed the tort of abuse of process. His Lordship was constantly mindful of the oblique motives and collateral purpose of PINS especially after assessing the testimonies and credibility of the witnesses Encik Zadey and Iwan.
>
> …

A (60) I find that it was plain to see that the real or predominant purpose of PINS in bringing the action was not to obtain genuine redress for its grievances. The learned judge made that clear in his GOJ. in paras 52.1 and 52.2 of the GOJ the learned judge recognized the defendant's real or predominant purpose of filing the suit when he held that from the narrative of events and conduct of parties, Suit No 154 was filed in order B to neutralize the outcome reached in Suit No. 1041 which did not favour them.

(emphasis added)

[17] The evidences of Zadey and Iwan for PINS were found to show that PINS was never truly interested to obtain the reliefs that PINS prayed for. C There was further found to be an abandonment of the pleaded case where Zadey had stated in his witness statement that there was an agreement that Bunga Raya could build but not own small and mini structures and in cross-examination "caved in" and admitted the reason was not true. This confirmed the respondents' claim that, for all intents and purpose, PINS did D not have a true grievance for Suit 154. Refer to para. 65 of the GOJ.

[18] Next was the contention that the claim should fail as the allegation of collateral purpose was not specifically pleaded but mere reliance on the cause papers and GOJ in Suit 154. The issues such as "revenge", "punishment", "personal attack" and "bargaining chip" were never pleaded. This was dealt E with in paras. 69 and 70 of the GOJ as follows:

(69) Having considered the pleadings as a whole and in particular to paras. 10 to 18 of the SOC, I am of the considered view that it is not necessary to use those actual phrases in the pleadings. The collateral purpose can be gleaned from a number of ways among them would be F from the facts and circumstances of the particular case. The collateral purpose can also be obtained and discerned from the testimonies of the witnesses and the documentary evidence used to support the claim.

(70) I noted that those were the words used by both witnesses to describe and express their thoughts and their feelings from a personal point of view after judgment was pronounced in their favour. G

[19] The evidence of Iwan was also considered, where he was found to have "capitulated" and agreed that the only reason the allegations were made against the individual respondents was because of their relationship with Bunga Raya. The JC found this akin to shutting the door to any contention H that the respondents had failed to prove the collateral purpose behind Suit 154. Refer to para. 71 of the GOJ.

[20] With regard to PINS not calling any witnesses, the JC essentially said that PINS could have rebutted all of the respondents' assertions but took the path of choosing not to give evidence. Reference was made to *Takako Sakao* I *v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 of the consequence of silence at the end of a plaintiff's case.

[21] The JC had earlier found the respondents' witnesses, who were the first and second respondents, to be reliable and credible and had accepted their evidence. The JC found it evident that the failure of PINS to give evidence lent further weight and gave strength to the respondents' case. The failure of PINS to answer and give evidence was a matter of immense serious consequences and gave the JC the right to draw an adverse inference. Refer to para. 89 of the GOJ.

[22] The JC next said as follows:

> (90) I am inclined to hold the view that the defendant's witnesses deliberately refrained from entering the witness box for no reason other than in view of the less than stellar evidence given in Suit No 154.

[23] The JC concluded in para. 91 of the GOJ that the respondents had on their pleaded case and, through their testimonies, successfully discharged their burden of proof and had proven their case on a balance of probabilities.

[24] On damages, the JC stated in para. 100 of the GOJ that where the tort of abuse of process has been proved, the respondents are entitled to damages and compensatory damages such as legal fees and expenses incurred to defend the suit as well as exemplary, punitive and aggravated damages, upon proof of the same. The losses suffered were not too remote and the loss is caused by the tort perpetrated by PINS (para. 109 of the GOJ).

[25] The respondents were awarded RM1,295,056 as the legal fees and expenses in defending Suit 154, as proven through supporting documents. As general damages, RM100,000 was each awarded to the first respondent, Bunga Raya and Urban Domain and RM60,000 to the second respondent.

Our Decision

Liability

[26] The appeal of PINS was mounted on several fronts; namely insufficient pleadings, the lack of a collateral purpose and the High Court's treatment of its no case to answer.

Collateral Purpose In The Tort Of Abuse Of Court Process

[27] From the written and oral submissions, PINS's focus was on collateral purpose and we therefore propose to deal with it first.

[28] The elements that go towards constituting the tort of abuse of court process has been succinctly stated in *Malaysia Building Society Bhd (MBSB)*. At p. 438, it was stated as follows:

> In my judgment, the essential elements of the tort of abuse of process are these:
>
> (1) The process complained of must have been initiated;

A (2) *The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process*; and

(3) The plaintiff must have suffered some damage or injury in consequence.

B

It is to be stressed that *neither malice nor the termination of the proceedings in the plaintiffs favour are necessary elements* of the tort. To put it plainly, *a plaintiff in an action for abuse of process need not prove that the defendant had invoked the process of the court maliciously. Neither does he have to prove that the proceedings terminated in his favour*.

C

It is only upon proof of the elements that go to make up the tort of collateral abuse of process, that a plaintiff is entitled to an award of damages.

(emphasis added)

D **[29]** It was submitted by PINS that the JC had erred in omitting the most important element when in para. 47(iii) of the GOJ, it was stated that 'there must be a collateral purpose proven' and had not stated that such collateral purpose must aim at producing a result not intended by the initiation of such civil proceeding.

E **[30]** We note that there is no ground in the memorandum of appeal that the JC had erred in omitting the most important element for tort of abuse of process that such collateral purpose must aim at producing a result not intended by the initiation of such civil proceeding.

[31] In any event, the passage from MBSB that we have quoted above was F the very same passage relied on by the JC in para. 46 of the GOJ, in particular element (2) on collateral purpose. Paragraphs 46 and 47 of the GOJ are to be read together.

[32] The respondents' claim was essentially that Suit 154 was filed to neutralise the effect of Suit 1041. It may be recalled that PINS' claim in G Suit 1041 was dismissed and the respondents' claim in Suit 154 was allowed. It was contended by PINS that the effect of the judgment in Suit 1041 can only be neutralised or avoided if it had won Suit 154, which it did not. Therefore, it would be impossible for the outcome of Suit 1041 to be neutralised just because PINS filed Suit 154.

H **[33]** In other words, the contention is that it is necessary for PINS to achieve victory in Suit 154 or win Suit 154. The collateral purpose of the neutralisation of the judgment obtained in Suit 1041 can never be achieved by merely filing Suit 154.

I

[34] It was further contended that PINS was only interested to obtain a favourable outcome in Suit 154. The filing of Suit 154 in itself could not give rise to a collateral purpose.

[35] To support the proposition that victory has to be achieved or PINS must win Suit 154 before there can be a collateral purpose, reference was made to the passage in *Crawford Adjusters* at p. 25:

> [63] What is an improper purpose? A helpful metaphor suggested by Isaacs J in the High Court of Australia in *Varawa v. Howard Smith Co Ltd* [1911] 13 CLR 35, at p. 91, is that of a stalking-horse:
>
> > if the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse of process for this purpose ...
>
> *The metaphor aids resolution of the conundrum raised by the example of a claimant who intends that the result of the action will be the economic downfall of the defendant who may be a business rival or just an enemy, if the claimant's intention is that the result of victory in the action will be the defendant's downfall, then his purpose is not improper: for it is nothing other than to achieve victory in the action, with all such consequences as may flow from it. If, on the other hand, his intention is to secure the defendant's downfall - or some other disadvantage to the defendant or advantage to himself - by use of the proceedings otherwise than for the purpose for which they are designed, then his purpose is improper ...*
>
> (emphasis added)

[36] However, we note that in the preceding para. 62, the Privy Council earlier said the following:

> [62] It is hard not to regard abuse of process as a tort distinct from malicious prosecution if only because, *apart from the need to establish a purpose not within the scope of the action (ie a 'collateral' or, more helpfully, an 'improper' purpose), abuse of process requires neither that the action should have been brought without reasonable cause nor that it should have terminated in favour of the alleged victim ...*
>
> (emphasis added)

The words "**nor that it should have terminated in favour of the alleged victim**" (emphasis added) would show there is no requirement for victory or winning, as suggested by PINS.

[37] Further, the passage in the aforesaid para. 63 relied by PINS starts with "The metaphor aids resolution of the **conundrum** raised by the **example** of a claimant ..." (emphasis added). This passage appears to be pivoted on a conundrum raised by an example. Here, there is no such conundrum because in actual fact, PINS was not intending to win Suit 154. This will be dealt with subsequently.

[38] The contention that there must be a victory or a win in Suit 154 is further not supported by *MBSB*. We refer to p. 438, which we had set out earlier and we reproduce the relevant part as follows:

> It is to be stressed that neither malice nor the termination of the proceedings in the plaintiff's favour are necessary elements of the tort. To put it plainly, a plaintiff in an action for abuse of process need not prove that the defendant had invoked the process of the court maliciously. Neither does he have to prove that the proceedings terminated in his favour.

[39] The words "*neither malice nor the termination of the proceedings in the plaintiff's favour are necessary elements of the tort*" (emphasis added) would render it crystal-clear that whether or not PINS wins or secures victory in Suit 154 is not a necessary element in the tort of abuse of process. This would bring us back to element (2) in *MBSB*, which we again reproduce as below:

> (2) *The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process*; and
>
> (emphasis added)

[40] We would therefore conclude on this issue that a collateral purpose requires that the purpose of initiating the process must be for some purpose other than to obtain genuine redress, which the process offers. It is aimed at producing a result not intended by the invocation of the suit. It is not required that PINS must win the process in Suit 154.

Whether There Was Misplaced Reliance On Suit 154

[41] The next issue then arises as to whether the collateral purpose behind PINS' filing Suit 154 was proved.

[42] PINS contended that the JC had placed much, if not, all emphasis on the findings in Suit 154 to determine that the HC in Suit 154 had found there was a collateral purpose. This was an error by the JC as it was the task of the JC to make a finding on collateral purpose and not rely on the finding of the HC in Suit 154. The tort of abuse and collateral purpose were never tried in Suit 154.

[43] The JC had indeed referred to the findings of the HC in Suit 154 and this could certainly be done given that it was pleaded in paras. 8 and 9 of the statement of claim in this suit that the respondents will rely on the amended writ and statement of claim in Suit 154 and the GOJ in Suit 154.

[44] In paras. 53, 55, 56, 58 and 60 of the GOJ, the JC stated as follows:

> *(53) In my considered view the existence of the collateral purpose behind PINS filing of Suit No 154 has been more than amply satisfied with the pronouncement by the learned judge in the GOJ*. In his usual objective and analytical scrutiny of the

evidence and the issues the learned judge had concluded and made findings in regard to the collateral purpose behind PINS' initiation of Suit No 154.

...

(55) The question predominant in His Lordship's consideration was 'whether the present suit was an afterthought and a retaliation for the outcome in Suit No 1041 and/or filing of the winding up petition by Urban Domain against PINS and OSC?' (see para 52 GOJ).

(56) His Lordship's decision was affirmatively as follows:

> [52.1] In this regard, based at the chronology of events and the manner in which the case has been pleaded and the evidence of PW1 and PW2, *it is quite clear from the narrative of events and conduct of the parties, that the present suit is an afterthought and quite possibly filed in order to neutralize, so far as possible the outcome that was reached in the earlier proceedings which did not favour the plaintiff.*
>
> [52.2] In this regard *I cannot ignore the possibility that the present suit was filed with an oblique motive or a collateral purpose.*
>
> [52.3] On that analysis, and based on the narrative of facts alluded to earlier, *I am convinced that this suit is plainly and patently an abuse of process.*

...

(58) In my considered view *the trenchant findings of the learned judge in Suit No 154 left no room for any lingering doubt that His Lordship was convinced that Suit No 154 was filed for a collateral purpose, an oblique motive and not merely on the issues of estoppel and res judicata*. The court can only make findings from the records, the evidence before it and from the GOJ of the learned judge. *I have scrutinized and considered the GOJ carefully and it is my conclusion that the learned judge had spent a good part of his judgment on establishing that PINS had committed the tort of abuse of process. His Lordship was constantly mindful of the oblique motives and collateral purpose of PINS especially after assessing the testimonies and credibility of the witnesses Encik Zadey and Iwan.*

(60) *I find that it was plain to see that the real or predominant purpose of PINS in bringing the action was not to obtain genuine redress for its grievances. The learned judge made that clear in his GOJ. In paras. 52.1 and 52.2 of the GOJ the learned judge recognized the defendant's real or predominant purpose of filing the suit when he held that from the narrative of events and conduct of parties, Suit No 154 was filed in order to neutralize the outcome reached in Suit No. 1041 which did not favour them.*

(emphasis added)

[45] We pause to note that the respondents in para. 10 of this suit pleaded that in particular they will rely on para. 52.3 of the GOJ in Suit 154.

Evidence Of The Respondents' Witnesses And Insufficient Pleadings

[46] The submission of PINS was that the material facts relied on by the respondents for abuse of court process were not pleaded. According to PINS, the evidence led and not pleaded were as follows:

(i) Suit 154 was initiated by PINS as a 'revenge' on the first respondent, Bunga Raya and Urban Domain;

(ii) Suit 154 was 'a lie from start to finish';

(iii) Suit 154 was filed against the second respondent as 'punishment by association';

(iv) PINS used Suit 154 as 'a tool to exert pressure' on Urban Domain in Suit 1041; and

(v) PINS was hoping that Suit 154 could be used as a 'bargaining chip for Suit 1041'.

[47] It was further submitted that these words were also not to be found in the GOJ of Suit 154.

[48] In this regard, the JC found as follows in paras. 69, 70 and 81 of the GOJ:

> (69) Having consider the pleading as a whole and in particular to Paragraphs 10 to 18 of the SOC I am of the considered view that it is not necessary to use those actual phrases in the pleadings. The collateral purpose can be gleaned from a number of ways among them would be from the facts and circumstances of the particular case. The collateral purpose can also be obtained and discerned from the testimonies of the witnesses and the documentary evidence used to support the claim.
>
> (70) *I noted that those were the words used by both witnesses to describe and express their thoughts and their feelings from a personal point of view after judgment was pronounced in their favour*. In particular I refer to the answers given by PW2 in cross-examination:
>
> > *CTJ: Now, questions 14 and 15. You used phrases and words such as 'to retaliate against me', 'association with Haji Kamal' and 'Suit No 154 is an obvious lie'. Again, would you agree with me that these words are not pleaded and no particulars of these words are pleaded in the statement of claim?*
> >
> > *PW2: In our statement of claim, the whole judgment is pleaded and these words are coming from the judgment itself. The word retaliation is from the judge himself. So, its all actually pleaded.*
> >
> > *DC: So, only the word retaliation is from the judgment. Correct?*
> >
> > *PW2: Yeah. Revenge is another word for the retaliation, which is covered under the judgment, which is covered under the associates.*

> *CTJ: Okay. So, you are saying, because you have pleaded the grounds of judgment in your statement of claim, hence everything else that comes from that is taken as pleaded. Is that what you're saying?*
>
> *PW2: Yes.*
>
> ...
>
> (81) As for PW2, her plight was made worse by the mere fact that she was associated with PW1 and/or to the fifth plaintiff. I wholly agreed with her lament that it was 'too much'. I found it absolutely reasonable for her to say that it was a retaliation against her, revenge and to punish her by association.
>
> (emphasis added)

[49] We find and agree that there was no necessity to plead those words. The respondents were relying on the GOJ in Suit 154, where 'retaliation' was used and the first respondent's understanding that 'revenge' is another word for it. The other words came from the witnesses, own understanding of their meaning. The core issue is the collateral purpose, amplified and developed by the witnesses' understanding and using their own words. It was thus said in paras. 66 and 67 GOJ:

> (66) *Both PW1 and PW2 testified to this fact and this can be seen from their own words what they thought of the suit against them. Both saw the allegations as spurious lies and an act of revenge personally against them. In his evidence PW1 was asked to explain why he claimed that it was a means of 'revenge' and he replied that Suit No 154 was built on a lie from start to finish and that Encik Zadey and Iwan on behalf of PINS did not have any evidence to support their claim but still they went ahead purely as a retaliation against PW1*. PW1 pointed out that Suit No 154 was filed while in the process of exhausting the appeal process in Suit No 1041 and *it was filed for no other reason than as a tool to exert pressure on Urban Domain*. PW1 further recounted that he and Iwan held discussions to settle Suit No 154 and Suit No 1041 amicably but he said he would not agree to accept Suit No 154 as a bargaining chip. Under cross-examination, it was put to PW1 that the discussion took place only during formal mediation. PW1 disagreed and asserted that there were discussions with Iwan at other times and not only during the mediation.
>
> (67) Azrina, PW2 too in her testimony alleged that she was dragged in and sued as a retaliation simply because of her association with PW1 in the telecommunication industry.
>
> (emphasis added)

[50] The JC had, in the summary of the first respondent's evidence, stated the basis of PINS' action was based on his own knowledge of revenge and understanding of injustice, that it was a retaliation for the filing of Suit 1041 and a bargaining chip for Suit 1041. All these showed the collateral purpose in the initiation of Suit 154.

[51] The fact remained that PINS had to put questions to the first respondent with regard to the discussion, where he said he would not agree to accept Suit 154 as a bargaining chip, that it only took place during mediation. The answer of the first respondent was that there were other discussions and not just at mediation.

[52] Further, as held in *Superintendent Of Lands And Surveys, 4th Division & Anor v. Hamit B Matusin & Ors* [1994] 3 CLJ 567; [1994] 3 MLJ 185 at p. 191, 'evidence bearing on the two alleged defences is not such a radical departure but a mere development of what had been alleged by the defendants'. In addition, PINS was not taken by surprise at those words where there was no rebuttal submission from it.

[53] Ultimately, the JC had correctly found as per para. 82 of the GOJ that the tort of abuse of court process had been proven by the respondents' witnesses. We find no reason to depart from this finding.

Evidence Of Zadey And Iwan (Witnesses Of PINS In Suit 154)

[54] The JC did not just rely on the finding in Suit 154 but had also considered the evidence of Zadey and Iwan in Suit 154. In this regard, it was pleaded in paras. 11, 12 and 13 of this suit as follows:

> 11. The plaintiffs will also rely on all the cause papers and Notes of Proceedings and written submissions in the SUIT for their full terms and effect.
>
> 12. In particular, the plaintiffs will rely on the Supplementary Witness Statement of Encik Zadey Che Wan Bin Abdullah Fadzil of the defendant, wherein his evidence at A 1 reads '... **Hence, we made the decision to allow Ahmad Kamal to build for others but not to own any infrastructures**.'
>
> 13. The plaintiffs aver that the aforesaid evidence constituted an abandonment of the pleaded claim in the SUIT.
>
> (emphasis added)

[55] In paras. 65 and 71 of the GOJ, the JC stated as follows:

> *(65) It is evident from the testimonies of Encik Zadey and Iwan that PINS was never truly interested to obtain the reliefs prayed for in the ASOC. PINS showed their hand when Encik Zadey in his witness statement alleged there was an agreement that the fifth plaintiff could build but not own small and mini structures. Certainly without a doubt this evidence constituted an abandonment of PINS' original pleaded claim. To make matters worse under rigorous cross-examination the witness caved in and admitted that even this reason was not true. This confirmed the plaintiffs' claim that for all intents and purpose PINS did not have a true grievance for Suit No 154. The learned judge was conscious of that and pinned this as the collateral purpose which was the predominant underlying reason for the suit.*
>
> ...

(71) It is pertinent to point to the evidence of Iwan in Suit No 154 at the particular moment where he capitulated and agreed that the only reason the allegations were levelled against the four individuals is because of their relationship with Bunga Raya. This admission is significant and that in itself shuts the door to any doubt whatsoever in regard to the defence contention that the plaintiff had failed to prove the collateral purpose behind the filing of Suit No 154.

(emphasis added)

[56] The evidence of Zadey was his supplementary witness statement, which was tendered before the cross-examination of Iwan was over. Whilst Iwan was giving evidence to support the pleaded case that PINS had sole exclusivity to build telecommunication towers/small and mini structures in Perak to the exclusion of all others, Zadey's testimony was that PINS had "waived" the exclusivity to build, but not the exclusivity to own, meaning that Bunga Raya could build but not own towers in Perak. However, in cross-examination, Zadey admitted that this new evidence on "waiver" (build but not own), was not true.

[57] In relation to Iwan, he was found to have made the following admission as recorded in the notes of proceedings in encl. 7/187, lines 29 to 34 as follows:

LKW En Iwan, I put it to you that the only reason you make allegations against these four individuals is because of their relationship with Bunga Raya. Agree or disagree? The only reason is because of their relationship with Bunga Raya. Agree or disagree?

AHMAD Yes.

[58] These had been addressed in paras. 65, 71 and 75 of the GOJ.

[59] Thus, the JC found in para. 84 of the GOJ that:

(84) In the circumstances, *I am of the considered view that the plaintiffs had succeeded in proving that Encik Zadey and Iwan had through their evidence in Suit No 154 admitted to having had a collateral purpose in filing their suit. That evidence constituted in my view a clear and present collateral attack by the defendant. It could not have gotten any clearer than those admissions made by the defendant's own witnesses*.

(emphasis added)

[60] We, therefore, find that the abandonment of PINS's pleaded case and the admission that the individual respondents were sued because they were related to Bunga Raya show that PINS was not contemplating victory and not seeking genuine redress in initiating Suit 154. This effectively meant that PINS' own evidence showed its collateral purpose in filing the suit. This, coupled with the evidence of the respondents' witnesses, fortified the collateral purpose behind Suit 154.

Submission Of No Case To Answer

[61] In this suit, PINS did not call any witnesses and proceeded on a no case to answer. It is now contended that as the respondents had failed to discharge their burden of proof, it was a situation of a no case to answer. We do not accept such a contention for the following reasons.

[62] Firstly, we had earlier found that the respondents had proven its case.

[63] Secondly, we refer to *Takako Sakao*, which was also referred by the JC. At pp. 398 and 399, these were stated:

> [3] ... The appellant took the witness stand and gave her evidence on the terms of the arrangement and about the sum of money she had provided. No evidence was called on the part of the first respondent to refute the appellant's testimony. Such an important omission was missed by both courts below.
>
> [4] *In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true ...*
>
> Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: does the first defendant/respondent have a case to answer? This failure on the part of the trial judge is a serious non direction amounting to a misdirection which occasioned a miscarriage of justice. The trial judge was at that stage not concerned with his belief of the appellant's evidence. She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently improbable. In these circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way. He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice.
>
> [5] *The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference ...*
>
> (emphasis added)

[64] In the face of silence from PINS, the evidence given by the respondents ought to be presumed as true. The court can also draw an adverse inference. The point to note is that PINS can take the position that accepting the respondents' evidence on the face of it, there is no case to answer; or that the evidence led is unsatisfactory that the court should find that the burden of proof has not been discharged.

[65] However, PINS' position is that the respondents' evidence was not pleaded, which we have rejected. PINS' position does not fall within the above two circumstances of no case to answer as laid out above.

[66] Without any evidence from PINS, the JC found that 'It is evident that the failure ... to give evidence lent further weight and gave strength to the plaintiffs' case ...' and that:

> (89) I find that the failure of the defendant to appear and give evidence to be a matter of immense serious consequences. In my considered opinion the failure of the defendant to call its witnesses gives me the right to draw an adverse inference against the defendant under s. 114(g) of the Evidence Act 1950 which reads as follows: ...

[67] The JC then found as follows:

> **(90) I am inclined to hold the view that the defendant's witnesses deliberately refrained from entering the witness box for no reason other than in view of the less than steliar evidence given in Suit No 154**.
> (emphasis added)

[68] We note too that in para. 89 of the GOJ the JC had reiterated that she found the respondents' witnesses to be reliable and credible and she accepted their evidence to be the truth. Refer also to para. 83 of the GOJ.

[69] Under the circumstances, we find that the submission of no case to answer cannot be accepted and the inelegant silence of PINS in this suit, due to their 'less than stellar evidence' in Suit 154, to be a matter of immense serious consequences that it has to live with, as per *Takako Sakao*. It lent further support to the respondents' case.

Conclusion On Liability

[70] We, therefore, find and agree with the JC that the respondents have proved their claim premised on the tort of abuse of court process.

Damages

Special Damages

[71] The court had awarded RM1,295,056 to Bunga Raya being the legal fees and expenses incurred in defending Suit 154 until the Federal Court. The issue here is whether such legal costs are recoverable as damages.

[72] In *Golden Star & Ors v. Ling Peek Hoe & Anor And Another Appeal* [2024] 6 CLJ 487, the leave questions before the Federal Court were as follows:

> Question 1
>
> Whether "costs" as defined under O. 59 r. 1 of the Rules of Court 2012 are distinct from damages?
>
> (i) Following from the foregoing, are costs recoverable as special damages in the same proceedings between the parties?

A (ii) Whether legal fee is a specie of special damages and thus claimable over and on top of costs?

Question 2

Whether the following Commonwealth authorities which have held that legal fees cannot be recovered as damages should also be adopted as the B law in Malaysia? ...

[73] In paras. 55 and 56 at p. 509, the conclusion was:

[55] *On principle and on policy including social policy, we agree with the line of authorities relied on by the appellants that the respondents are not entitled to claim* C *as special damages, the legal charges, legal fees, legal costs or litigation costs in the same proceedings between the same parties*.

[56] We answer the two questions posed in the appellants' favour. In line with the Commonwealth authorities cited and relied on by the appellants and discussed above, costs are indeed distinct from damages for the reasons adumbrated above. *Costs including legal costs are not recoverable as* D *special damages in the same proceedings between the same parties*.

(emphasis added)

[74] The respondents sought to rely on "same proceedings between the same parties" to the effect that, in this instance, this suit was for the tort of abuse of court process and not the legal fees *per se*.

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[75] We are unable to accept such a contention as *Golden Star* was clear that legal fees and expenses are costs and cannot be recoverable as damages in proceedings between the same parties. Further, upon proof of the claim, special damages being claimed are the very same legal fees. We refer to F paras. 20, 24, 25, 31 and 33 at pp. 499, 500 and 501 as follows:

[20] *The award of costs is a matter of discretion; quite different from an award of damages as damage is one of the elements that must be proved in order to succeed in a claim, be it in tort or contract*. This power to award costs is specifically provided for in the Courts of Judicature Act 1964 (Act 91); namely ss. 25(2), 70 and 99.

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...

[24] ... *Costs incurred in prosecuting a claim cannot be in itself a cause of action, whether in separate or the same proceedings. More so, in the circumstances of the present appeals where costs were claimed as special damages between the same parties* H *in the same proceedings, when there was already a specific order on costs; and where the items claimed as costs or special damages were themselves claimable as costs*.

[25] *There is in place in our system of civil justice a fairly elaborate costs regime. While the courts on the one hand are conferred with discretion to award costs, there is, on the other hand, an extensive regime in the Rules of Court 2012 to complement that exercise of discretion. The regime in O. 59 deals with a myriad of matters* I *regarding costs including what costs may be claimed, when costs are to be determined, and what factors or considerations should weigh at the material time of award. Even*

the amounts are spelt out, in broad terms. This costs regime is there for a purpose: to regulate the award of costs, ensuring that there is to a large extent, consistency and uniformity in the awards of costs. There is a balance of interests between the "winning" and the "losing" parties so that access to justice remains a real and viable right.

...

[31] *The second principal reason why the costs incurred in the same proceedings between the same parties cannot be claimed as special damages is as a matter of principle and policy*. We have actually already alluded to some aspect of that principle and policy when discussing O. 59 of the Rules of Court 2012.

...

[33] ... *Damages are compensatory in nature awarded to compensate for loss sustained as a result of a civil wrong committed in breach of a duty of care*. Whether such damages are recoverable or not is a matter of proof dependent on the evidence adduced at trial. As mentioned earlier, in the event there is lack of proof, the award should be *nil* or nominal. Costs of litigation on the other hand are discretionary. *Costs are "a sum of money which the court orders one party to pay to another party in respect of the expense of litigation incurred ... Costs are distinct from damages*" (see *Halsbury's Laws of England*, 4th Reissue, Vol 12(1) p. 266 para. 807). Order 59 r. 2 of the Rules of Court 2012 have also provided:

> (2) Subject to the express provisions of any written law and of these Rules, the costs of and incidental to proceedings in the Court, shall be in the discretion of the court, and the court shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (emphasis added)

[76] Arising therefrom, costs are not recoverable as damages where the respondents cannot commence this suit to recover its costs incurred in Suit 154 as special damages.

[77] It is not disputed too that costs had been awarded at all levels of the courts in Suit 154.

[78] We are, therefore, bound by the Federal Court decision in *Golden Star* that legal fees are not claimable as special damages.

General Damages

[79] In the course of its latest oral submission on 6 May 2024, PINS indicated it would not pursue the appeal on general damages.

A

Outcome

[80] For the above reasons, the appeal is allowed in part to the extent that the special damages of RM1,295,056 to Bunga Raya being the legal fees and expenses incurred, is set aside.

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[81] We affirm the decision on liability and the award of general damages.

[82] We award costs of RM30,000 to the respondents subject to allocatur.

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